RECOVERY BY BUILDING CONTRACTOR IN DEFAULT

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> For this by nature is equitable, that no one
> be made richer through another's loss.[1]

These words written by Pomponius in the second century provide a beginning point for a study of the remedies available to a person who has defaulted in his contractual obligations. No one contends—probably not even Pomponius—that this principle states an inflexible rule. Many enrichments are left untouched by courts.[2] As Professor Dawson has pointed out, the beauty of Pomponius' maxim lies in the very fact that it is not a rule, but only a principle.[3]

For many law students the acceptance of this principle comes (if at all) only after hard hours of soul-searching. Its difficulties lie not in the harshness of its words—on the contrary, they have a "ring" of justness to them—but in its application to the cases as they arise. Notice that Pomponius concerned himself not one whit with the *fault* of the person enriched nor with the *innocence* of the loser. His approach of natural equity centered on the fact of enrichment and the fact of loss.

The common law courts were clearly not going to allow this principle to become a "rule of law." These were the courts that hammered out doctrines requiring broken promises in contracts and negligence in torts before the person harmed could shift his financial losses to the one causing the harm. Nor were those courts satisfied with this. In torts the plaintiff had to be free of negligence that contributed (even in the smallest way) to his harm and he must not have assumed the risk of this injury.[4] Fault became the cornerstone of common law recovery. Such an approach was not inevitable but it is historical. Today, statutory examples of recovery where no fault exists have joined the

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[1] Digest of Justinian, lib. 12, tit. 6, s. 14, as quoted in DAWSON, UNJUST ENRICHMENT 3 (1951). A slightly different translation may be found in 4 SCOTT, THE CIVIL LAW 141 (1932): "For it is only in accordance with natural equity that no one should profit pecuniarily by the injury of another."

[2] "The mere fact that a person benefits another is not of itself sufficient to require the other to make restitution therefor. Thus, one who improves his own land ordinarily benefits his neighbors to some extent, and one who makes a gift or voluntarily pays money which he knows he does not owe confers a benefit; in neither case is he entitled to restitution. . . ." RESTATEMENT, RESTITUTION § 1, comment *c* (1936).

[3] DAWSON, UNJUST ENRICHMENT 3, 4 (1951).

[4] See PROSSER, TORTS §§ 51, 55 (2d ed. 1955).

few halting steps taken by the common law.[5] However, these are all viewed as "exceptions" and not as forming a pattern of another idea.

So it is that the thought of recovery where fault does not exist comes hard to the law student steeped in the tradition of first-year courses. It comes hard to courts. Even harder is a philosphy which suggests that a person who is, himself, at fault may have some possible cause of action against another who is entirely innocent. At this point, our student and many courts rebel so strongly that their minds are closed to further argument. We just cannot conceive of a system of law that allows a recovery by the "guilty" from the "innocent."

For this reason (and others) some restitution remedies have had a difficult time carving a niche in our legal system. They are looked at with suspicion. To help keep us on the common law track of fault the *Restatement of Restitution* allows recovery when a person has been "unjustly" enriched at the expense of another.[6] The word "unjustly" carries with it some idea of an unjust defendant and the words sound better. But is it necessary so to modify the defendant's enrichment? Perhaps so when we state a rule—as the *Restatement* struggled to do; probably not when we express a guide—as Pomponius did.

These ideas come to bear in those cases in which the plaintiff is in substantial default of his contractual obligations but has invested considerable money, time or material for which he has not been reimbursed by the other party to the contract. Here is a person who, by common law notions, is considered at *fault* but still is seeking recovery from someone who has not broken any promise. It is little wonder that many courts have refused all recovery to such a plaintiff. But struggling side by side with the common law notion of a fault-based recovery is the strangely haunting justice in Pomponius' declaration: "For this by nature is equitable, that no one should be made richer through another's loss." This article will trace the conflict between these two ideas through a few representative cases to try to ascertain where we stand today in our treatment of the plaintiff in default of his contractual obligations.

The Doctrine of Conditions

Substantial Performance and Divisibility

The reason that a plaintiff who has defaulted on his promise finds it difficult to recover for benefits conferred on the defendant centers around the doctrine of conditions. At one time it was enough to show merely that defendant covenanted, that he had not performed, and

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[5] *E.g.,* Workmen's Compensation Acts. The common law also worked out limited areas in which recovery was allowed irrespective of fault. See general discussion and citations in Prosser, Torts § 11 (2d ed. 1955). For an excellent article dealing directly with the problems of this paragraph, see Keeton, *Conditional Fault in the Law of Torts,* 72 Harv. L. Rev. 401 (1959).

[6] Restatement, Restitution § 1 (1936).

that his covenant was not *expressly* conditioned upon performance by the plaintiff. The precise contractual words were all-important. As was said in a 1500 case: "If one covenant with me to serve me for a year, and I covenant with him to give him 20 l, if I do not say for said cause, he shall have an action against me for the 20 l, although he never serves me; otherwise, if I say he shall have 20 l for said cause."[7]

Such an idea, though it persisted in England for at least another 200 years, was destined to be discarded. It was not "equitable" that the defendant should be compelled to perform without receiving the plaintiff's performance when all of the facts *implied* a condition to defendant's promise. Courts were not going to enrich one party at the expense of the other even though the words used directed such a result. Thus, after *Kingston* v. *Preston*,[8] conditions were implied when a reasonable interpretation of the words led to such a result and a body of law has been built up to aid a modern court in construing contract language.[9] In most bilateral contracts today performance by the defendant is conditioned (expressly or impliedly) on the prior or contemporaneous performance by the plaintiff.[10]

Had the courts stopped at this point, harsh results would have followed. One consequence would have been that in every case in which the plaintiff's performance was a condition precedent to the defendant's performance, plaintiff would have had to prove that he had completely performed before he could recover anything from the defendant. The tables would have been turned. Plaintiff's default in the smallest detail would have allowed the defendant to retain not

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[7] Anonymous, Y.B. 15 Hen. VII f. 10b, pl. 7 (K.B. 1500); See also Nichols v. Raynbred, Hobart 88, 80 Eng. Rep. 283 (K.B. 1614); Pordage v. Cole, 1 Wm. Saund. 319, 85 Eng. Rep. 449 (K.B. 1669) and inroads to doctrine of *Anonymous* in note to *Pordage*. This note is also reported fully in 3 WILLISTON, CONTRACTS § 820 (rev. ed. 1936) [hereinafter cited as WILLISTON].

[8] (K.B. 1772) as stated in Jones v. Barkley, 2 Doug. 684, 691, 99 Eng. Rep. 434, 438 (K.B. 1773). The court, through Lord Mansfield, is reported to have said: "[T]he dependence or independence of covenants was to be collected from the evident sense of the parties. . . . [I]n the case before the Court, it would be of the greatest injustice if the plaintiff should prevail." The plaintiff had demurred to a plea that he had not performed, arguing that the covenants were independent. In referring to the older English cases Lord Kenyon stated that the "determination in them outrages common sense." Goodeson v. Nunn, 4 T. R. 761, 764, 100 Eng. Rep. 1288, 1289 (K.B. 1792); See discussion of Kingston v. Preston in 3 WILLISTON § 817 and the general discussion of the problem in 3 CORBIN, CONTRACTS § 653-57 (1951) [hereinafter cited as CORBIN].

[9] 3 CORBIN § 656.

[10] "Where the two full performances reciprocally promised in a bilateral contract are the agreed exchange each for the other, and the contract provides that they are to be rendered and the exchange effected at the same moment of time, it has now long been held that the two promises are mutually dependent." 3 CORBIN § 656, at 616.

only his promised consideration but also a substantial portion of the plaintiff's performance. The defendant would have been made "richer through another's loss."[11] Here the traditional doctrine of fault gave way to the maxim of Pomponius. True, courts did not admit that this was their reason; they had to find other language and doctrines. Two of these deserve explanation.

(1) *Substantial performance.* Simply put, the application of this doctrine allows a plaintiff to recover "on the contract"[12] even though he has done something less than he promised. How much less he can do and still have the benefit of this doctrine is not and can not be made certain.[13] Judges who content themselves with calling a particular breach either "minor" or "substantial" (thus granting or refusing recovery on the contract) would also have us believe that the "willfulness" or "innocence" of the promisee at the time of his deviation from the contracted-for performance somehow affects his right of recovery.[14] While this harks back once again to the notion of fault, it is doubtful that the actual holdings of cases bear out the reliance on plaintiff's motives.[15] Clearly though, this doctrine of substantial performance was developed to protect persons who did not give the complete promised performance from suffering economic loss. This is done by allowing the plaintiff to recover the contract price less damages caused defendant by the "insubstantial" breach.[16]

This problem arises often in construction contracts; indeed, there is probably not a building standing that conforms exactly to its plans and specifications. Consider hypothetically a contract to build a house. The contract calls for a certain brand name pipe to be used. For

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[11] Notice how this just reverses the older cases where the plaintiff may well have been made "richer" through the defendant's "loss."

[12] The words "on the contract" were put in quotation marks because they are used so often by the court. They are, however, an inaccurate expression of the underlying theory of recovery. No suit is brought "on" a contract. It may be brought because a promise in the contract has not been performed by the other party. The language, "on a contract," usually denotes a suit brought to protect the plaintiff's expectation interest—that is, his interest in being placed (financially or through specific performance) in the position in which he would have been had defendant not broken his promise.

[13] RESTATEMENT, CONTRACTS § 275, comment *a* (1932).

[14] Gillespie Tool Co. v. Wilson, 123 Pa. 19, 26, 16 Atl. 36, 38 (1888). "It is incumbent on him who invokes its protection [substantial performance] . . . to present a case in which there has been no wilful omission or departure from the terms of his contract."

[15] See 3 CORBIN § 707 and cases cited therein.

[16] "It is not every breach that goes to the essence. It gives rise to an action of damages, but it does not necessarily justify a refusal to perform. Where, as here, the stipulation goes only to a part of the consideration, and may be compensated for in damages, its breach does not relieve the other party from performance." Tichnor Bros. v. Joseph Evans, 92 Vt. 278, 279, 102 Atl. 1031, 1032 (1918). For other cases see 5 CORBIN § 700.

reasons known only to the contractor, another brand of the same quality was used. To change brands of pipe now would require that the walls of the house be torn down. In a suit by the contractor for the remainder of the agreed price, are we going to prevent recovery on the theory that he is at fault in having broken his promise? Remember that the parties had a right to agree upon terms that they thought best and here they agreed on a specific kind of pipe. Yet the New York court on these facts allowed recovery, saying:

> . . . . The courts never say that one who makes a contract fills the measure of his duty by less than full performance. They do say, however, that an omission, both trivial and innocent, will sometimes be atoned for by allowance of the resulting damage, and will not always be the breach of a condition to be followed by forfeiture . . . .[17]
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> In the circumstances of this case, we think the measure of the allowance is not the cost of replacement, which would be great, but the difference in value, which would be either nominal or nothing . . . .[18]

A plaintiff in default does not forfeit all his time, money and material when the breach can be classified as "insubstantial."[19]

(2) *Divisibility.* Another doctrine that has ameliorated the harshness of the effect of conditioning promises is that of finding the agreement to be "divisible" or "separable." Although teachers of the course in contracts may object to this over-simplification, a divisible contract is, in many respects, similar to a series of contracts within a single contract.[20] The parties have dealt with a part performance on one side as the agreed equivalent for a corresponding part performance on the other side.[21] Thus, a promisee who has performed (or substantially performed) one of these parts may recover the value of the agreed equivalent for his performance although he is in substantial default as to his entire performance.[22] In such a situation the other person may, of course, recoup the damages caused to him by the substantial

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[17] Jacob & Youngs, Inc. v. Kent, 230 N.Y. 239, 241, 129 N.E. 889, 890 (1921).

[18] *Id.* at 244, 129 N.E. at 891.

[19] RESTATEMENT, CONTRACTS § 275 (1932).

[20] "Such a contract is often said to be 'divisible' as if the transaction consisted of a number of separate contracts, one for each of the apportioned pairs of installments." 3 CORBIN § 688, at 707.

[21] "A contract is divisible when by its terms, 1, performance of each party is divided into two or more parts, and 2, the number of parts due from each party is the same, and 3, the performance of each part by one party is the agreed exchange for a corresponding part by the other party." RESTATEMENT, CONTRACTS § 266, comment *e* (1932). For a general discussion see 3 CORBIN §§ 687-699; 3 WILLISTON §§ 860 A-64; Annot., 22 A.L.R.2d 1343 (1949).

[22] Carrig v. Gilbert Varker Corp., 314 Mass. 351, 50 N.E.2d 59 (1943); *accord,* Agnifili v. Lagna, 204 Cal. 262, 267 Pac. 705 (1928).

breach—but important here is to underline the fact that the substantial default does not prevent all recovery.

Whether a contract is divisible is a question of interpreting the words that were used in reaching the agreement.[23] Sometimes those words are clear as either establishing or preventing a separable contract. In many situations, however, the court uses this device to prevent a forfeiture or a penalty from being forced on the party who has performed only a portion of his entire promise.[24] This device is thus used side-by-side with the doctrine of substantial breach to prevent the harsh operation of the doctrine of conditions.

Quasi-Contractual Recovery

From this hurried background look at the law of contracts it is clear that plaintiffs have never been denied recovery simply because they are in default. Strange it is then that those same courts have experienced so much difficulty when the plaintiff has substantially defaulted on an entire contract. Then a notion of punishment—*i.e.*, that the contract breaker must be made to suffer an economic forfeiture —enters into the decisions. Perhaps it is some notion that other persons who have entered into contracts and are now considering breaking them will hear of the decision in this case and be forced (economically) to carry out their promises. Perhaps they represent a blending of contract law with criminal law. But, in any event, the decisions in this area combine ideas of punishment with attempts at compensation.

A review of the advance sheets makes it apparent that the great bulk of the recent cases in which a defaulter is seeking recovery fall in the area of the construction contract. Old legal wars have been fought around the employment contract (with the employee in default),[25] the vendor-purchaser contract (with the purchaser having paid a portion

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[23] "The authorities agree that in determining whether a contract shall be treated as severable or as an entirety the intention of the parties will control, and this intention must be determined by a fair construction of the terms and provisions of the contract itself." Leeker v. Marcotte, 41 Ariz. 118, 125, 15 P.2d 969, 971 (1932). "Whether a contract is active or divisible depends upon the intention of the parties as disclosed by the language of the contract, the manner in which it is to be performed, the method of payment, and the circumstances attending its execution and operation." Carrig v. Gilbert Varker Corp., *supra* note 22, at 358, 50 N.E.2d at 63.

[24] 3 CORBIN § 694.

[25] *Compare* Stark v. Parker, 19 Mass. (2 Pick.) 267 (1824) (denying recovery) *with* Britton v. Turner, 6 N.H. 481, 26 Am. Dec. 713 (1834) (allowing recovery). There have been many articles written on this problem. See, *e.g.*, Laube, *The Defaulting Employee—Britton v. Turner Reviewed,* 83 U. PA. L. REV. 825 (1935); Williston, *The Defaulting Employee—A Correction,* 84 U. PA. L. REV. 68 (1935); Laube, *The Defaulting Employee—No Retraction,* 84 U. PA. L. REV. 69 (1935). For a recent case involving an attorney in default of his contract to perform legal services see Moore v. Fellner, 318 P.2d 526 (Cal. App. 1957), *rev'd,* 50 Cal. 2d 330, 325 P.2d 857 (1958).

of the price and then defaulting),[26] and the sale of chattels contract (with either the buyer or seller in default).[27] However, due to statutes[28] and to our economy, these wars are no longer being fought with any frequency in our appellate courts. Thus, the construction contract will be used for the remainder of this article, referring to other cases only for ideas and for comparison.

No attempt was made to find the oldest case involving a contractor who defaulted and then sought recovery from the owner. Certainly, however, by the turn of the nineteenth century these cases had made their way into the appellate courts of this country. In an 1825 Pennsylvania case,[29] a Mr. Hopkins sued a Mr. Pedan and recovered a judgment in excess of $900. On appeal it appeared that Hopkins had agreed to build a bridge for Pedan but had not finished the work. To allow recovery on these facts the Pennsylvania court held to be error, saying:

> . . . . the building of one or more bridges was the plaintiff's cause of action, and he was not entitled to recover, unless the work was finished, or he was prevented from finishing it by the act or consent of the defendants.[30]

It does not appear from the report just how much work Hopkins did on the bridge (or bridges) and perhaps this is sufficient reason for reversing the lower court's judgment. The very general statement of the court, however, leads to rather harsh results.

Six years later this case was used as authority to prevent a Mr. Shaw from recovering from The Turnpike Company (of Pennsylvania).[31] His contract required Shaw to cut a fifty foot roadway, stone twenty-one feet of this way and open "summer roads." Shaw laid and stoned the twenty-one foot road but did not otherwise complete the contract. The Company took possession of the road and erected toll gates. Shaw then brought an action of debt and received a $1,700 verdict and judgment. On the Company's appeal, Shaw argued that the Company had "received the benefit of the workman's labor, which amounts *ipso facto* to a waiver, and makes the company liable to the payment of a *pro rata* sum." Coupled to the argument of waiver was

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[26] Corbin, *The Right of a Defaulting Vendee to the Restitution of Installments Paid,* 40 YALE L.J. 1013 (1931). Compare Rudolph, *The Installment Land Contract as a Junior Security,* 54 MICH. L. REV. 929 (1956). See Annot. 31 A.L.R.2d 8 (1953). Earlier annotations appear in 134 A.L.R. 1064 (1941), 102 A.L.R. 852 (1936).

[27] Annots., 99 A.L.R. 1288, 1292 (1935), 83 A.L.R. 959, 965 (1933), 37 A.L.R. 91, 100 (1925).

[28] For example, see Corman, *Restitution for Benefits Conferred by Party in Default under Sales Contract,* 34 TEXAS L. REV. 582 (1956), and Corman, *The Partial Performance Interest of the Defaulting Employer, II,* 38 MARQ. L. REV. 139 (1955); and see UNIFORM SALES ACT §§ 63-70.

[29] Pedan v. Hopkins, 13 S. & R. 45 (Pa. 1825).

[30] *Id.* at 47.

[31] Shaw v. The Turnpike Co., 2 P. & W. 454 (Pa. 1831).

a claim that harked back to Pomponius: "the defendants are now in possession of, and enjoying the fruits of the plaintiff's labor, and it would be against conscience that they should not pay for it."[32] Although Shaw's lawyer cited cases for the argument based on waiver, he cited none for the last sentence.

As indicated, the court reversed the judgment, saying that Shaw could not, however, "recover until he has finished the work."[33] It may be that the plaintiff should not have chosen debt as his form of action and that this is the basis of the decision, but, again, the language of the opinion required performance as the basis of recovery. Even in a later opinion[34] in which *quantum meruit* was urged as the ground of recovery the court sought to find an *implied in fact* agreement, entirely misconceiving the thrust of this idea.[35] Failing to find such an agreement, recovery was once more denied. We are left with the thought that the Company never did pay for its roadway.

This same court a few years after the *Shaw* case summarized the law (and its reasons) with these two sentences:

> . . . . To permit a man to recover for part performance of an entire contract, or to permit him to recover on his agreement where he failed to perform, would tend to demoralize the whole country. If the law were so, a man would just perform as much of his contract as would suit his convenience or cupidity; all faith and fair dealing would be at an end, and all confidence between man and man would be destroyed . . . .[36]

This quotation could be approached from many angles. The very basis of legal actions—as opposed to equitable actions—is that of allowing damages to be recovered from those who have not performed. So strongly has this idea been presented that noted jurists have remarked soberly that a person has an election to perform or to pay damages.[37] What of "faith and fair dealing" between man and man? Why has this idea suddenly assumed importance in a legal systetm founded on a different premise?

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[32] *Id.* at 457.

[33] *Id.* at 459.

[34] Shaw v. The Turnpike Co., 3 P. & W. 445 (Pa. 1832).

[35] See discussion under Acceptance of Benefits, *infra.*

[36] Martin v. Schoenberger, 8 W. & S. 367, 368 (Pa. 1845).

[37] "When a man commits a tort, he incurs by force of the law, a liability in damages measured by certain rules. When a man makes a contract, he incurs, by force of the law a liability to damages, unless a certain promised event comes to pass. But unlike the case of torts, as the contract is by mutual consent, the parties themselves, expressly or by implications, fix the rule by which the damages are to be measured. The old law seems to have regarded it as technically in the election of the promisor to perform or to pay damages. . . ." Mr. Justice Holmes in Globe Refining Co. v. Landa Cotton Oil Co., 190 U.S. 540, 543 (1903).

The part of this quotation from the *Shaw* case that has had the most impact, however, is the beginning of the second sentence. These courts are afraid that a promisor will perform just so much of his promise as he cares to and then sell that part to the promisee. Not only that (runs the argument), but he will do this when he has made a losing bargain and thus hold down his losses and conceivably even turn the "bad" deal into a profit. Since this must be stopped, the plaintiff will be denied recovery. For example:

> It would be an alarming doctrine, to hold, that the plaintiffs might violate the contract, and, because they chose to do so, make their own infraction of the agreement the basis of an action for money had and received. Every man who makes a bad bargain, and has advanced money upon it, would have the same right to recover it back that the plaintiffs have . . . .[38]
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> . . . . To allow a recovery of this money would be to sustain an action by a party on his own breach of his own contract . . . .[39]
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> . . . . An equity out of his own neglect! It is a singular head of equity . . . .[40]

Yes, it would be a singular "head" of equity that allowed a person to turn his own neglect into a cause of action; it would be even "more singular" if bad bargains could so easily be turned into profitable ventures. No one contends that this should be—or ever was—the law. If recovery is allowed, it is in spite of the breach, and all "badness" of the bargain must be considered in measuring the size of the defendant's benefit. Recovery, then, rests not on the neglect of the defaulting party but on the benefit which he has transferred to the defendant . . . a transfer that was made with no thought of either giving or receiving a gratuity . . . a transfer that was made, instead, as a part of a contracted-for-performance.

Stated this way, our problem highlights the divergence between fault-minded jurisprudence and a restitution-oriented legal system. Should our courts allow a person to be made richer through another's loss simply because that other person failed to perform a contract? Notice that the assumption here is that one party has been made *richer* —that is, realized a "net benefit"—from the services, material or money of another. This automatically deducts all damages suffered by the one enriched, including the destruction of the contract expectancy. As Corbin points out,[41] refusal to allow recovery actually penalizes the person who partly performs more than the one who refuses to perform at all.

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[38] Ketchum & Sweet v. Evertson, 13 Johns R. 359, 365 (N.Y. 1816).

[39] Lawrence v. Miller, 86 N.Y. 131, 140 (1881).

[40] See note to Harrington v. Wheeler, 4 Ves. Jun. 686, 691, 31 Eng. Rep. 354, 356 (Ch. 1799).

[41] *Supra* note 26.

Not only that, the more he performs the more he is penalized[42] until he reaches that shadowy area called "substantial performance." Then the penalty is removed and recovery of the contract price less damages (is this difference not roughly defendant's benefit?) is allowed. Refusing recovery—for any reason other than that there has been no benefit—leaves the part performer in an anomalous position. He suffers a penalty while the non-performer and the substantial performer respond only for damages suffered. Is there something about a "partly broken" contract that should lead to this result?

In the area of the building contractor who is in default this question should be answered with a clear "No." To the extent that his work and materials can be shown by him to have benefited defendant, he should be allowed recovery in an amount measured by the benefit. This sentence needs expansion for it involves the concept of "benefit" and of measuring that benefit. The remainder of this article will deal with these problems. However, at this point it should clearly be stated that recovery should not be denied a building contractor simply because he has failed to perform substantially his contract promise.

These principles can best be illustrated by the well reasoned opinion of the Ohio Court of Appeals in *Kirkland* v. *Archbold*.[43] There a contractor agreed to perform alterations on a residence for a price of $6,000, payable in installments of $1,000. After having done work (which the contractor alleged to have a "reasonable value" of just under $3,000) the contractor broke the contract and was evicted from the premises. At that time the owner had paid $800 and suit was brought for $2,200.

The court had several possibilities open to it:

(1) It could deny recovery on the theory that the contractor can "demand payment only upon and according to the terms of his contract, and if the conditions upon which payment is due have not been performed, then the right to demand it does not exist."[44]

(2) It could conceivably say that performance was substantial and allow recovery of the contract price less damages to the defendant. This however, would be stretching the doctrine of

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[42] That is, if *A* contracts to build a $10,000 home for $10,000 and he breaks the contract before he begins construction, damages would be nominal. Refusal to allow restitutionary recovery by *A* if he breaches after commencing work would have the odd effect of increasing damages through the amount put into the structure. The more he performed, the more we penalize him if we deny recovery.

[43] 113 N.E.2d 496 (Ohio App. 1953).

[44] Smith v. Brady, 17 N.Y. 173, 187 (1858); according to REPORT OF THE LAW REVISION COMMISSION (NEW YORK) 47 (1942), the *Smith* case establishes the New York rule that the building contractor in substantial default of an entire contract is entitled to recover nothing. This report is an excellent survey of the general problems involved in the area of the defaulting plaintiff.

substantial performance further than courts can in good conscience use the doctrine.[45]

(3) It could conceivably hold the contract to be divisible and allow recovery for the number of parts that have been substantially performed. The problem here is that a building contract is not ordinarily divisible since the payments are progress payments only and do not represent the agreed equivalent for the contractor's performance.[46]

(4) It could allow recovery in quasi-contract (or *quantum meruit*) on the theory that the work and materials supplied by the plaintiff benefited the defendant.

This last possibility becomes the third method by which the harshness of the doctrine of constructive conditions can be obviated. It joins with ideas of substantial performance and divisibility in fighting forfeitures and penalties; in a larger sense, however, this is the very reason that forced these first two ideas into judicial recognition and thus it embraces both of them. The common law court, troubled by the fact that the contract defendant may be made richer at the expense of the plaintiff, took care of the more obvious cases with "pieces" of Pomponius' idea —only it called those pieces "substantial performance" and "divisibility."[47] Through quasi-contract the entire idea is reflected and its pieces fall into proper focus.

Just how quasi-contract (or, we repeat, *quantum meruit*) operates can be shown by a return to *Kirkland*.[48] The contractor was in default but had done about one-half of the agreed-upon job. The proceedings in the trial court are not reported but evidently the trial judge somehow felt that it was not fair for defendant to keep the work without payment. Because of this feeling of unfairness he strained the contract language to find it divisible—the $1,000 payments at stated intervals forming the base for his finding. He had sensed the idea of unjust enrichment found in the emotive words, *felt* and *fair*, but could express it only through the doctrine of divisibility. At this point the trial judge experienced difficulty for only the first payment was due under his reasoning. Following the mechanical fiction to the end, the judge entered judgment for the plaintiff-contractor for $200 ($1,000 less the $800 already paid) and the contractor appealed.

The opinion shows that his appeal was in the face of several Ohio cases that had denied quasi-contractual recovery to a party who was in

[45] Note, *Substantial Performance of Building Contracts in New York*, 31 COLUM. L. REV. 307 (1931).

[46] Fuller v. United Electric Co., 70 Nev. 448, 273 P.2d 136 (1954); New Era Homes v. Forster, 299 N.Y. 303, 86 N.E.2d 757 (1949).

[47] ". . . . [T]he right to recover for part performance of an entire building contract . . . is purely of judicial creation, having in view the inequity of permitting a person to suffer great loss to the enrichment of another. . . ." Foeller v. Heintz, 137 Wis. 169, 179, 118 N.W. 543, 547 (1908).

[48] *Supra* note 43.

substantial default of his contract promise.[49] Had those cases been followed without understanding thought, the Court of Appeals would have had to grapple with the problem of whether this was in fact a divisible contract. On this sole ground the decision would probably have been reversed and a judgment entered for defendant.[50] Refusing to take this path, Judge Skeel (writing for the majority) reasoned:

> (1) The result of the older Ohio cases is to enrich one party and to penalize the other. (Pomponius has come once more to the front). "This result comes from unduly emphasizing the technical unity and entirety of contracts."[51] (Fault is being given too great an emphasis in deciding contract cases).
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> (2) Other jurisdictions are allowing recovery by a defaulting contractor where "substantial value" has been contributed to the defendant's property. "These decisions are based on the theory of unjust enrichment."[52]
>
> (3) Recovery is to be determined by the "value of the work and materials expended on a *quantum meruit* basis" less damages caused by the plaintiff's breach.[53]

The case was sent back for a new trial and the plaintiff given the "green light" to recover in quasi-contract. Here is presented graphically the beginnings of a re-orientation of the Ohio legal system from one that looked only at fault toward one that also serves for enrichment. No one is suggesting, of course, that this will become the only base for recovery. It is, instead, an idea that has been struggling for recognition and is at last attaining its place as a legally protected interest. Significant in the Ohio court's opinion—and a factor which should be met in every case in which the plaintiff is in substantial default—is this sentence:

> . . . . The action is not founded on the broken contract but on a quasi-contract to pay for the benefits received . . . .[54]

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[49] One of these cases was Ashley v. Henahan, 56 Ohio St. 559, 47 N.E. 573 (1897). This was a construction contract in which plaintiff sued "on the contract" alleging substantial performance and, in another count, in *quantum meruit* for extra work. There is language in the part of the opinion dealing with the suit on the contract that could be considered as denying quasi-contractual recovery for a plaintiff in default. However, it should be remembered (1) that the suit was brought on the theory of protecting the expectation interest of the plaintiff and (2) $1,000 was paid on a $9,365 contract with $200 being required to alter the defects. In such a situation, it is not surprising that the court did not "strain" to construe the suit as one for restitution. The *quantum meruit* claim failed when the court held that the extra work done was within the contracted-for performance. Granting the correctness of the finding of fact, the conclusion that *quantum meruit* is not open is correct.

[50] See REPORT OF THE LAW REVISION COMMISSION (NEW YORK), *supra* note 44, at 206.

[51] 113 N.E.2d at 499.

[52] *Ibid.*

[53] *Ibid.*

[54] *Ibid.*

The teacher of Restitution will object to the idea that some suits are brought "on a contract" while others are founded "on a quasi-contract." In theory, no action is founded *on* a contract; it is brought because the other party has failed to do what he promised he would do and the promisee is seeking protection of his expectation interest—he is seeking to be placed in the position in which he would have found himself (either financially through damages or, as nearly as possible, through specific performance) had the promisor performed. This is not a suit *on* a contract. It is a suit brought because of a breach of a contract. Nor in theory is an action founded *on* a quasi-contract for the reason that there is no such *thing* as a quasi contract. This is a name that has been given to a suit that protects the restitution interest of the plaintiff —to take from the promisor the benefit that he has received by virtue of the plaintiff's performance or part performance. The plaintiff stands neither *on* nor *off* a contract when he sues. These expressions are merely shorthand methods of describing the interest that is seeking protection; however, inaccurate expressions have a habit of coming back to haunt the speaker.

Putting these problems aside, however, the idea behind this quotation from the *Kirkland* opinion strikes at the heart of our problem. Contrary to the notions of the earlier cases, the plaintiff is not making his own infraction the basis of his action. He is not turning a bad bargain into a good one. Nor has an "equity" arisen out of his own neglect.[55] The basis of his action—if any he has—is the benefit that he has conferred on the defendant pursuant to contract. This the Ohio court saw clearly when it showed the way for the contractor's recovery in the *Kirkland* case.

How then should a lawyer proceed when he has a case in which his contractor-client has substantially defaulted on a building contract but still seeks to recover for benefits conferred? His basic substantive problems are these:

(1) He must prove that the defendant has received a benefit as a result of the contract.

(2) He must be able to meet a claim that benefit was not accepted by the defendant.

(3) He must be able to meet a claim that the breach was intentional (or willful).

(4) He must prove the value of the benefit conferred.

These four points are considered separately below.

1. The Benefit

This word is the keystone of the plaintiff's recovery. The plaintiff's attorney should never forget that he is seeking to recover for just one thing: the benefit that the defendant has received from the part performance of a contract. The *Restatement of Restitution* rests the

[55] See notes 38-40 *supra.*

allowance of restitution on the concept of unjust enrichment but defines enrichment as "benefit" and then adds: a "person is unjustly enriched if the retention of the benefit would be unjust. . . ."[56] Thus, the plaintiff's lawyer must show the *benefit* and then fit his case within those that courts treat as an unjust retention of benefits. The plaintiff has the burden of proving the benefit and his burden is not satisfied by showing only his losses in connection with the contract.[57] In fact, unless the value of the losses is relevant evidence of the defendant's gain, it should not even be admitted by the trial court.

The difficult problem is, of course, trying to state the meaning of benefit. These restitutionary remedies are relatively recent in origin. Not many years ago courts were struggling to determine whether there must have been in tort cases a conversion of the chattel into money before there was a benefit.[58] Even though this battle is probably over in most states—the result being that such a conversion is not necessary —other battles are still being waged to mold and to shape this concept of benefit.[59] In short, the very newness of this concept makes it impossible to catch up and to reflect a workable definition at this time in its history.[60]

In construction contracts, however, most of the problems can be solved without such a fine definition. The vast majority of recent cases are similar to the situation found in *Kirkland*. The plaintiff entered upon the contract, performed a portion of it according to plans and then defaulted. The defendant is now able to complete the contracted for work at a lower price than he agreed to pay the plaintiff for the whole contract. In this regard he has received an advantage—or a benefit—from the work of the plaintiff and the restitutionary remedies (in this case, undoubtedly the remedy of quasi-contract or its modern equivalent under local practice) should be available. Perhaps the measure of the benefit will be difficult but the existence of some "benefit" such as will make available these remedies is usually clear.

At the other extreme is, however, another kind of case that must be considered under a definition of benefit. This is best represented by *Pinches v. Swedish Evangelical Lutheran Church*.[61] There the plaintiff agreed to construct a church for defendants "according to plans and specifications." The final building varied from those plans in that the ceiling was two feet lower, the windows were shorter and nar-

[56] RESTATEMENT, RESTITUTION § 1, comment *a*, at 12 (1936).

[57] 5 CORBIN § 1124.

[58] Jones v. Hoar, 22 Mass. (5 Pick.) 285 (1827) (1935).

[59] *E.g.*, for whether trespass to realty is covered, see Fanson v. Linsley, 20 Kan. 235 (1878), holding that it is not covered and Edwards v. Lee's Adm'r. 265 Ky. 418, 96 S.W.2d 1028 (1936), allowing recovery; for whether a saving of expense is a benefit, see Olwell v. Nye & Nissin Co., 26 Wash. 2d 282, 173 P.2d 652 (1946), and RESTATEMENT, RESTITUTION § 1 (b) (1936).

[60] DAWSON AND PALMER, CASES ON RESTITUTION 455-59 (1958).

[61] 55 Conn. 183, 10 Atl. 264 (1887).

rower, and the seats were narrower than specifications required. All of these variations were due, at least in part, to the "inadvertance" of the plaintiff and his workmen. Such a case as this presents, first of all, the question of whether there has been a benefit received by the defendants. They have, of course, a building that they did not have prior to the contract; thus, the contract has resulted in some *thing* being added to their property. This should be sufficient to open quasi-contractual remedies, leaving us still with the difficult problems of whether the retention of such a benefit would be unjust and, if so, how to measure such a benefit. These problems are considered in the remainder of this article.

The point made here is that this "thing" added to the property of the defendants, added pursuant to a contract, should be considered as *opening* restitutionary remedies. In this respect, the finding of this kind of a benefit is to restitutionary remedies much like the finding of negligence is to tort cases. It *opens* remedies. It is not all that must be shown to have a recovery; but it is the necessary starting point. This approach is emphasized to remind the lawyer always to center this type of remedy on an approach that hits at one thing: *the benefit that defendant has received.*

2. Acceptance of the Benefit

One of the problems that has entered into the words used by courts in reaching their decisions is the notion that the defendant must have "accepted" the particular benefit.[62] When the thing in question is returnable—that is, when it is something that the defendant could simply hand back to the plaintiff when he (the defendant) discovers that it is not up to contract specifications—then the fact that he has decided to keep it is cogent evidence that he has received a benefit from the plaintiff's labor, even though it was defective as measured by the contract terms.[63] In such a case it becomes easy to rest a decision for the defendant on the basis that he refused to accept the benefit conferred on him. It becomes easy because the language has within it the familiar ring of contractual acceptance. In fact, it becomes so easy that some courts have forgotten that the basis of this remedy is benefit and have centered it in acceptance. Notice this summary:

> It is essential to such a recovery (quasi-contract) that there be an acceptance by the other party of such partial performance . . . .[64]

As long as the defective performance involves a thing that is returnable, this search for a benefit through the indirect means of an acceptance presents relatively little harm. If the defendant has kept the item, there is probably a benefit; if he has returned it, there probably is no benefit. But when we turn to the problem of the building contractor who has substantially defaulted, different considerations arise.

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[62] 5 CORBIN § 1126.

[63] See UNIFORM SALES ACT § 69.

[64] Annot., 107 A.L.R. 1411 (1937).

Return of the particular addition is impractical since damage to the real estate or to structures on the real estate would result from the removal. In one sense, the owner has no real choice to accept or reject. Return being impractical, it would appear inappropriate to continue the search for an "acceptance" of the benefits that have been conferred in part performance of such a contract.

Yet, this has not prevented courts from continuing such a search. An example of the problems created is *Nees v. Weaver*[65] in which the plaintiff had a contract to place a roof on the defendant's garage. The contract price was $325, payable on completion of the job. In a suit for the $325 the court found that plaintiff had substantially broken his promise but that he was entitled to recover the reasonable value of his work only if he could "show an appropriation or use amounting to an acceptance thereof" by defendant. How could plaintiff show that a roof had been "accepted"? At the time of the trial it had neither been torn off nor had it been replaced. As far as the court knew, the same roof was on the garage that plaintiff had put there pursuant to the contract. Not only that, the jury had found that it could be repaired for seventy-five dollars. Thus, the original job could now be completed for a savings of $250. But somehow the plaintiff was going to have to show that the roof had been "accepted."

Suppose that he showed that defendant parked his automobile in the garage in the evening, that he stored his garden tools there during the summer, that he kept his lawnmower there so it would not rust by standing out in the rain, and so on. In short, suppose that plaintiff proved that the defendant *used* the garage with the roof that he (the plaintiff) had put on it. The court, joining a host of decisions, held that this could not be an acceptance and denied recovery. "[A]cceptance of the work for which recovery is sought must be something besides keeping and using where there is no opportunity to return what has been received."[66] What that extra *something* had to be the court does not say, and, in the tradition of case law decisions, did not have to say. Nevertheless, we are left to ponder just what it is that plaintiffs must show in order to meet the test of "acceptance" in these cases involving additions to real property.

Undoubtedly the best way to answer this problem is to return to the reason underlying the search for an acceptance. This remedy of quasi-contract is to disgorge benefits received;[67] acceptance is but one method of determining whether there has been in fact a benefit received. It is, however, a method. It is not the goal of the search. That it was

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[65] 222 Wis. 492, 269 N.W. 266 (1936), 4 U. CHI. L. REV. 492 (1937).

[66] *Id.* at 497, 269 N.W. at 268.

[67] "The purpose of the quasi-contract action is not to compensate the plaintiff for any loss or damage suffered by him but to compensate him for the benefit he has conferred on the defendant. . . ." Hughes v. Oberholtzer, 162 Ohio St. 330, 335, 123 N.E.2d 393, 397 (1954).

to become the goal for some courts was foreshadowed when the name quasi-*contract* was attached to the remedy. Having used a name which involved a purely fictitious promise, courts must somehow breathe life into their fiction. This they did in the requirement of an acceptance. Here is language of contract bordering on ideas of mutual assent. Acceptance now comes to mean an express promise to pay for the defective performance or facts from which such a promise can be implied.[68] The circle is complete. That which was a fiction has become a reality; the remedy of quasi-contract has become a remedy of contract.

Perhaps this trap would not have been sprung had the first judge called this a quasi-something-else, but that, too, would have called forth a fiction that could well have us searching for some other fact that exists only in fiction. Thus, it is long past the time to do away with this contractual search in a non-contractual area; it is time to rid quasi-contract of a notion that there *must* be an "acceptance" before the court can take this enrichment from this defendant and transfer it to this plaintiff.

This is perhaps too bold an approach to leave without discussing the effect that it would have on the various kinds of cases that arise. One type of case is presented in *Nees* where the defective performance was clearly repairable. There it will be recalled, the owner had contracted for a $325 roof but had received a roof that required an expenditure of seventy-five dollars to make it conform to specifications. He neither tore off the defective performance nor did he move out of the garage. Has the work of the contractor amounted to a benefit to the owner within the notions of quasi-contract? Our answer is a clear yes, and it is yes irrespective of any contractual notion of acceptance. Whether defendant has said that he accepts (an express promise) or whether he has in fact repaired the defects and thus received a completed roof (an implied-in-fact promise) is not essential to recovery. What is important is that the owner promised to pay $325 for a new roof of a certain kind and quality. He received work and materials that make it cheaper for him to have the completed job. To the extent that the total job is cheaper, the owner has received a benefit.

Instead of phrasing this problem in terms of acceptance, it is believed that the courts would come closer to a quasi-contractual recovery if they answered this question: is there something in the fact that the plaintiff has failed to perform his contract promise that should now allow the defendant to change his mind as to the final job and thereby keep a benefit that has been conferred upon him pursuant to that con-

[68] "The defendant may make himself liable . . . by his voluntary acceptance of the benefits under circumstances sufficient to raise an implied promise to pay for them." Kelley v. Hance, 108 Conn. 186, 189, 142 Atl. 683, 684 (1928). A case which in dictum finds an acceptance in "word or act, or by a failure to speak or act. . . ." is Braswell v. Malone, 262 Ala. 323, 327, 78 So. 2d 631, 633 (1955).

tract? What is there in the breach that gives the innocent party the power to decide that he no longer wants the contracted-for performance and then keep (without paying for it) the part performance that has in fact amounted to an enrichment? In some cases there will be a reason for denying the recovery,[69] but these will be cases in which the part performance was not a benefit to the defendant. Certainly the *Nees* case, on the facts that we have, is not such a situation.

A bit harder to reconcile are the cases in which the work done is not repairable—that is, cannot be changed to conform to contract specifications without making a substantial expenditure which does not reflect itself in a corresponding increase in the market value of the structure after repairs as compared to its market value before those repairs. This rather cumbersome definition of the meaning of "not repairable" is necessary since, in the broad sense, every defective performance can be made to conform to the contract. For instance, the building could be torn down and the entire structure rebuilt. The cost of repair here would be the expenses of tearing down as well as those of rebuilding. By the same token, walls could be removed to replace a brand name of pipe with the one called for by the contract, foundations can be dismantled while an "I" beam is replaced, and siding can be ripped off so that a different kind of insulation can be substituted. Often when these things are done the resulting change in market value of the structure is much smaller than the expense involved in making the change. Courts often refer to such alterations as "economic waste;" we have categorized them as "non-repairable."

In these cases our suggested formula for finding benefit runs into difficulty. If we were to continue to subtract the cost of making the structure conform (to specifications) from the value of that structure as defectively constructed, the result may be to give the owner a building with a substantial market value for a nominal price—or in some instances, for nothing.[70]

On the other hand, if we merely compel him to pay to the contractor the value of that building, we have ignored the personal desires of the owner with which the contractor agreed to conform. Here the courts must move slowly but the guide star for their decisions does not change. If the structure was to be used for business, then personal considerations that do not reflect themselves in decreasing the value should not be considered. The owner can use the building for his business or can sell it for its value. The cost of repair should not be given in such an instance—but remember that the defect in the performance may be so great that there is no substantial value added to the property of the owner. If the structure was to be used for personal purposes or

[69] Schwasnick v. Baldwin, 65 F.2d 354 (2d Cir. 1933) (value of employee's services not approved); Carpenter v. Josey Oil Co., 26 F.2d 442 (8th Cir. 1928) (partially completed well of no value); 5 CORBIN § 1126, at 563 n.33.

[70] See, *e.g.*, Elliot v. Caldwell, 43 Minn. 357, 45 N.W. 845 (1890).

if it had no readily determinable market value (as for example, the church in the *Pinches* case[71]), allowance should be made for personal tastes and the court give the owner more discretion in claiming damages based upon repair costs. This amounts simply to a recognition of the probabilities of actual repair. The probabilities are stronger in those cases where the personal element is present. It also recognizes that there is a "damage" to the owner in this last group of cases (since he now must live with the unrepaired building) that—although not measurable in precise figures—is still worthy of consideration. However, even in these instances, value to defendant is allowed as the measure of plaintiff's recovery in appropriate cases.

Acceptance is thus a word that must be viewed with considerable care. It should never have been made the basis of quasi-contractual recovery as some cases have done. Acceptance, if used at all in a court's decision, should describe a result reached by the court that the owner has benefited from the contractor's partial performance. This idea is suggested by Corbin in these words:

> . . . . [A]cceptance may mean only that the defendant has made use of the results of a defective performance, making the best of a bad situation after a breach has been committed. This last is what has usually occurred; and the court finds an "acceptance" of the benefits as a mode of avoiding the supposed rule that a contract breaker has no right to compensation.[72]

3. Quality of Plaintiff's Breach

When one who defaults on a contract brings an action to recover for the value of his work and labor, it would seem to be reasonable for the court to determine what the work and labor is worth to the defendant with due allowance, of course, for any damages which the defendant has suffered by reason of the plaintiff's default. This type of approach conforms readily to the simple justice expressed in Pomponius' statement. Our courts, however, have often chosen to examine the behavior of the defaulting plaintiff rather than determine the benefit which he may or may not have conferred upon the defendant.

Standing squarely across the plaintiff's road to recovery is the hurdle of willfulness. If the court can find that plaintiff's default was willful, he may recover nothing. Williston has summarized the attitude of the courts thus:

> [T]he weight of authority strongly supports the statement that a builder, whose breach of contract is merely negligent, can recover the value of his work less the damages caused by his default, but that one who has willfully abandoned or

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[71] *Supra* note 61.

[72] 5 CORBIN § 1126, at 558.

> broken his contract cannot recover . . . . It seems probable that the tendency of decisions will favor a builder who has not been guilty of conscious moral fault in abandoning the contract or in its performance.[73]

There is an air of righteousness about these words, "willfully abandoned or broken," "guilty of conscious moral fault." Why should such a plaintiff recover anything from the innocent defendant who stood ready at all times to complete his obligations under the contract? Perhaps, however, this is the wrong question. Suppose that it were turned around and we were to ask: why should *not* a plaintiff who has willfully defaulted recover benefits conferred? How has the quality of the plaintiff's behavior diminished the measurable benefit which the defendant has received? Why should the defendant be enriched at the plaintiff's expense simply because the plaintiff has been "bad"?

To test these questions let us assume a case in which Contractor agrees to build, according to plans and specifications, a house for a total price of $20,000. After completing approximately one-half of the structure, Contractor leaves the job and refuses to return. Assume further that no legal or moral justification can be found for his behavior; he is, if ever there was one, a willful defaulter. If no payments have been made to Contractor, Owner can now complete the house for approximately one-half of the original price. If Contractor can recover nothing because of his willfulness, Owner now has a $20,000 home for which he has paid around $10,000.

It is true that in the cases which Williston cites in support of his summary of American decisions, the courts use language which would lead to a result of no recovery.[74] An examination of the facts of these cases, however, reveals that in relatively few of them did the judgment result in the defendant's obtaining the entire benefit without paying its rough equivalent to the plaintiff.[75] In most of the cases cited the language

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[73] 5 WILLISTON § 1475.

[74] *Id.* at 4124 n.3.

[75] See Maxwell v. Moore, 163 Ala. 490, 50 So. 882 (1909); Cotey v. Greenlee County, 20 Ariz. 150, 178 Pac. 25 (1919); Johnson v. Fehsefedt, 106 Minn. 202, 118 N.W. 797 (1908); Elliot v. Caldwell, 43 Minn. 357, 45 N.W. 845 (1890); Jennings v. Camp, 13 Johns R. 94, 7 Am. Dec. 367 (N.Y. 1816); Schmidt v. North Yakima, 12 Wash. 121, 40 Pac. 790 (1895). "Certainly there are cases refusing restitution on this ground (that the breach was wilful and deliberate) but after a search for examples of clearly unconscionable forfeiture your editors conclude that such are rather rare." DAWSON AND PALMER, CASES ON RESTITUTION 452 (1958). These authors refer to 45 COLUM. L. REV. 72 (1945) for statistics and to the fact that building contracts generally call for progress payments as a reason for few forfeiture cases. This, however, does not solve cases in which there have not been progress payments made. Dawson and Palmer emphasize this on page 454.

of willfulness was superfluous.[76] In many of the older cases, therefore, the result, although couched in the terms of no recovery because of the quality of the breach, did not result in a complete forfeiture of the work and material that plaintiff had put into the contract. The contractor received roughly the value of the benefit that had been conferred on the defendant.[77]

Still other cases which state that their denial of recovery rests on the willfulness of the plaintiff's breach, nevertheless provide another reason on which the decisions can rest. *Harris v. The Cecil N. Bean*[78] is an example of this. There the majority said: "The general rule is that no such (*quantum meruit*) recovery can be had by one who has deliberately abandoned, or broken, his contract . . . ."[79] However, there was no showing by the plaintiff (who was in substantial default of an entire contract) that his work and materials had benefited the defendant. Absent such a showing there is no right to quasi-contractual recovery. Thus, the decision can rest on a ground wholly irrespective of the quality of the breach involved. This was pointed out in Judge Clark's concurring opinion.

In a larger sense, the willfulness of the breach should have no effect on the recovery of the plaintiff. In the first place, every breach is willful in the sense that the act which constitutes it was done intentionally. The act of putting in material different from that specified is an intentional act—that is, the workmen knew what they were doing when they did that particular job. However, it is clear that this alone is not a "willful" breach as it is spoken of by the courts. There must be a knowledge that what is being done is a deviation from the contract promise.[80] Thus, difficulties arise in trying to determine whether there was, in fact, knowledge of the defective performance. Secondly, the courts must decide just who must have this knowledge. Is it enough that a workman or that the foreman knew? Is it enough that a subcontractor has the knowledge? What do we do when the contractor is a corporation? Do we follow the agency rules as to when notice to an officer is notice to the corporation?

Finally, granting that the knowledge of the deviation has been found to exist, there is still the question of whether it is sufficient to be classified as "willful." Good reasons for the breach may be shown so

[76] Ohio Oil Well Drilling Co. v. Givens, 206 Cal. 468, 274 Pac. 966 (1929) (well contracted for valueless, defendant drilled another); Kelley v. Hance, 108 Conn. 186, 142 Atl. 683 (1928), 38 YALE L.J. 389 (1929) (excavation started but no other work done under contract to build sidewalk is of no value); Stroeh v. McClintock, 128 Mo. App. 368, 107 S.W. 416 (1908) (unsuitable architectural plans of no value).

[77] McGonigle v. Klein, 6 Colo. App. 306, 40 Pac. 465 (1895); Robinson v. De Long, 118 Miss. 280, 79 So. 95 (1918).

[78] 197 F.2d 919 (2d Cir. 1952).

[79] *Id.* at 922.

[80] RESTATEMENT, CONTRACTS § 357, comment *e* (1932).

that the court will hesitate to say the defaulter is "guilty of conscious moral fault." He may not have been able to obtain the material needed or his work may have been stopped by a labor dispute. Must we go further to find whether the contractor was at fault in not ordering soon enough or in causing the labor difficulties? How else can an issue of *moral* fault be determined? If we must head down these roads in order to determine whether this plaintiff should recover the benefits he has bestowed upon this defendant, we have carved out a considerable task for a court.

This task is not called for by the type of action here presented. Important is whether defendant has been benefited. Whether that benefit came from a bad or a good plaintiff should have no importance. The real problem here is whether this "badness" on the part of the plaintiff is sufficient to penalize him economically. Test the idea in this manner: return to the $20,000 house contract discussed earlier in this section. Assume that progress payments were provided in the contract and the owner had paid for the work to date. Assume further that the contract provided that in the event of breach by the Contractor he was to return to Owner all sums that had been paid pursuant to the contract. Is there any doubt but that a court would classify this as a penalty and refuse to enforce it in a suit by Owner? The very fact that the more Contractor performs the greater his liability, would lead to that conclusion. Nor would the fact that he *willfully* refused to complete the building alter this result.

Legal answers should not be changed simply because of the happenstance of when payments are to be made. Decisions should not turn on who is the plaintiff and who is the defendant. Results should not rest on a "childlike faith in the existence of a plain and obvious line between the good and the bad, between unfortunate virtue and unforgivable sin."[81] They should rest, instead, on a determination of whether a benefit has been conferred on the defendant pursuant to contractual obligations.

4. Measuring the Benefit

No one specific formula of damages can cover all the kinds of cases that arise when the plaintiff is in substantial default of an entire contract and yet has benefited the defendant. That is, no one specific formula can be given unless we are to be satisfied with such a generalization as: the plaintiff should recover the *net* benefit or the *unjust* enrichment that the defendant has received.[82] These are often of but little help

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[81] 5 CORBIN § 545.

[82] "The recovery in a quasi-contract action is based upon value and is imposed without the assent of the defendant to prevent such defendant from enriching himself at the expense of the plaintiff." Hughes v. Oberholtzer, 162 Ohio St. 330, 335, 123 N.E.2d 393, 397 (1954); RESTATEMENT, CONTRACTS § 357 (3) (1932).

in particular cases except as they point the direction in which an answer can be found.[83]

Two general approaches are found in the language of the courts to aid in determining specifically the method by which the benefit should be measured. One is found in the *Kirkland* case to which we have referred several times in this article. The other is found in *Gillis* v. *Cobe*.[84] It will be helpful to set these out:

Kirkland: [T]he defaulting contractors, where their work has contributed substantial value to the other contracting party's property, [are entitled] to recover the value of the work and materials expended on a quantum meruit basis, the recovery being diminished, however, to the extent of such damage as the contractor's breach causes the other party.[85]

Gillis: [I]f it appears that the contract is a beneficial one to the landowner, the plaintiffs are not entitled to recover any part of the margin of benefit which the landowner secured by the making of the contract when they resort to a recovery for the value of the thing produced by their misdirected work. In such a case, the contractor is entitled to the value of the building as it is, in the light of the landowner's right to have the building built, and properly built, for the contract price. If, for example, the landowner secured by his contract the erection for $2000 of a building worth $3000, and the

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[83] An excellent discussion of the various contract interests protected by courts appears in Fuller and Perdue, *The Reliance Interest in Contract Damages*, 46 YALE L.J. 52, 373 (1936). These interests are listed: (1) *The restitutionary interest.* In its narrowest application, this is the interest created when the plaintiff in reliance on the contract confers something of value on the defendant. It is protected through various restitutionary remedies that range from quasi-contract through replevin and constructive trust. It is this interest that a contractor is seeking to protect when he is in substantial default of an entire contract. (2) *The reliance interest.* In its narrowest application, this is the interest created when the plaintiff in reliance on the contract changes his position other than by conferring value on the defendant. An example is paying the costs of title search in reliance on a land purchase contract. It is protected through a series of remedies admirably discussed by Fuller and Perdue. (3) *The expectation interest.* This is the "usually protected" interest in contract actions, seeking to place the plaintiff in the position in which he would have been had the contract been performed. This is done through actions which give plaintiff the value of the defendant's performance or through the action of specific performance. This represents only a summary of the three interests as they exist in their extremes. Like all generalizations, the walls that separate them break down in the hard cases. See, *e.g.*, L. Albert & Son v. Armstrong Rubber Co., 178 F.2d 182 (2d Cir. 1949); Planche v. Colburn, 8 Bing. 14, 131 Eng. Rep. 305 (C.P. 1831). See also annot., 17 A.L.R.2d 1300 (1951).

[84] 177 Mass. 584, 59 N.E. 455 (1901).

[85] 113 N.E.2d at 499.

> plaintiff, in erecting the building, fails to comply with the contract, and the building, erected as it is erected, is worth $2500, the plaintiff is not entitled to recover $2500; all that he is entitled to recover is twenty-five thirtieths of $2000.[86]

The first idea expressed is that the contractor is entitled to recover the value of work and materials expended less damages caused by the breach. The second idea is that the contract price should be a limit on that recovery. While we have no objection to these general ideas (in fact, we urge their consideration by a court facing this problem), there are difficulties that must be guarded against when we seek to apply them to specific fact situations. These difficulties merit consideration.

Looking first to *Kirkland*, there is the immediate problem of defining the two terms, "value" and "damages." Beyond the knotty fact-problems involved whenever we set out to determine the *value* of a thing, there is here the added question: value to whom? Is this the value to a willing but completely hypothetical buyer or is this the value to this defendant? Some cases, following the theory of the quasi-contractual remedy, have indicated that it is the value to the defendant that is important.[87] Viewed thus, damages (which are the second half of the *Kirkland* formula) have already been considered since only when they are deducted can we know the value of the defective structure (as it stands) to the defendant. Our first caution is, then, that the *Kirkland* formula should not be used to deduct damages from "net" benefit to defendant—else the plaintiff will be punished to the gain of the defendant.

But *Kirkland* does not limit the value question to value to defendant. Instead it speaks of value as the worth of the work and materials expended and uses the second half of the formula to assure that *net* benefit is the thing finally measured. This approach appears sound. The plaintiff proves a prima facie case by showing the reasonable value of the work that he has done and the materials that he has expended in his defective performance of the contract. Defendant then shows the damages that have resulted from plaintiff's breach of the contract[88] and these are deducted from the value as proved by the plaintiff.[89] This

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[86] 177 Mass. at 600, 59 N.E. at 461.

[87] "[H]e [the plaintiff] must prove how much the result of his work had benefited the defendant, he must prove what the fair market value of the thing produceed by his misdirected work is; and, until he has done that, he has not made out even a *prima facie* case. . . ." *Id.* at 594, 59 N.E. at 458.

[88] These damages should be forseeable within the meaning of Hadley v. Baxendale, 9 Ex. 341, 156 Eng. Rep. 145 (1845). See discussion of the test of forseeability in 5 CORBIN §§ 1006-28. Simply because the defaulting party is suing as plaintiff rather than being sued as defendant should not change the damage "rules" by which recovery is measured.

[89] Notice how this approach places the burden of proving damages on defendant. On the problem of burden of proof see 5 CORBIN § 1124, at 553-54.

approach to the measure of recovery blends into one action the plaintiff's suit for benefits conferred and the defendant's suit for breach of the building contract. The difference between benefits conferred and damages suffered is—in the language of the *Restatement of Contracts*—the "net" benefit that defendant has received through the part performance and the one for which he must make restitution.[90] This is exactly the same approach as was found when plaintiff was only in minor default of his contract promises;[91] the two doctrines blend into one problem with but one answer.

"Damages" cannot, however, be lightly passed by. What are the items that are deductible as "damages"? First and foremost, the owner is entitled to protection of his expectation interest. If he made a "good" contract—that is, one in which he was to receive a structure worth more on completion than he had agreed to pay for it—the "goodness" of that contract must be preserved for him. He has every right to insist upon compliance with each detail of the contract or to receive compensation for its breach. It is for this reason that Owner and Contractor entered into the contract and it is this end that our legal system assures through its protection of the expectation interest of the person who has not defaulted on the contract.[92] The result for which we strive is that the completed structure should not cost Owner more than he agreed to pay and Contractor agreed to take for its construction. In the case of a plaintiff in default this result should be controlled through the measure of recovery allowed against the defendant.

This is undoubtedly the thought that prompted the hypothetical problem discussed in *Gillis v. Cobe*. There the court assumed that a $2,000 contract required Contractor to construct a building worth $3,000. This Owner has a *good* bargain to the extent of $1,000. This "goodness" must be protected in a suit for benefits conferred just as jealously as it would be in a suit for damages suffered.[93] The court however, overlooked complete protection of this interest for it measured recovery for the defaulting contractor at twenty-five thirtieths of the $2,000 contract price. Converted to dollars and cents, this would allow Contractor $1,667 for the work and materials expended prior to his

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[90] RESTATEMENT, CONTRACTS § 357 (3) (1932).

[91] Jacobs & Youngs v. Kent, *supra* note 18; Leonard v. People's Tobacco Warehouse Co., 128 S.C. 155, 122 S.E. 678 (1924); Foeller v. Heintz, *supra* note 46.

[92] As pointed out, *supra* note 83, the expectation interest is protected in legal actions through the damage formula which measures recovery by deducting from the value of the defaulter's promise the value of the promise made by the non-defaulting party. Applied to the hypothetical case in Gillis v. Cobe, *supra* note 84, the expectation interest of the "non-defaulter" was $1,000 and deserves judicial protection against breach.

[93] These results should not turn on who happens to be the party plaintiff. If a contract interest merits protection, that protection does not depend upon who brings the law suit and who defends it.

default. Owner has now received a $2,500 building for $1,667, thus cutting his expectation interest from $1,000 that it would have equaled had there been complete performance to but $833 with part performance. This is wrong in that it fails to protect completely the good bargain which defendant made and which under the substantive law of contracts was protected against financial loss.[94] Thus, while the idea in *Gillis* that the contract price is to form the upper limit on recovery is sound, the language used in describing the method of measuring recovery for part performance needs a closer look by the courts.[95]

But damages as deducted from "value" must include more than just the expectation interest of the defendant. They must also include compensation for those items of recovery which are necessary to protect the expectation interest.[96] If the breach is one that is properly categorized as "repairable,"[97] then the cost of tearing out the defective work must be compensated for in order that the Owner not have to pay more for the contracted-for structure than the contract price. Once the defective work is torn out, the cost of completion should be deducted only as it reflects itself in the expectation interest of the defendant.[98] If the breach is, on the other hand, one that is "not repairable," then the injury that has been thrust on defendant is the difference between the value of the structure as it would have been completed had the contract been com-

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[94] *E.g.*, suppose the contract price for a structure was $2,000 and that $500 will be required to complete it after plaintiff's default. If the contractor proves the value of the work and materials is $1,800, the entire cost of completion should not be subtracted from this amount as "damages." The recovery on these facts should be $1,500; that is, the value of the work diminished by the defendant's proportionate loss in the "goodness" of his bargain. See RESTATEMENT, CONTRACTS § 357, illus. 3. (The consideration of contractor's profit, omitted from this example, is discussed in note 102 *infra*.)

[95] Obviously, the *Gillis* formula is incomplete. Despite the preamble to the mathematical calculations which said, ". . . [T]he plaintiffs are not entitled to recover *any part of the margin of benefit which the landowner secured by the making of the contract. . . .*" *supra* note 86 (Emphasis added.), the formula does not preserve the contract expectancy of the defendant. He is required to pay no more than $2,000 for his $3,000 building. It would be more correct to complete the formula by saying that the plaintiff is entitled to twenty-five thirtieths of the contract price diminished by the costs of completion which are in excess of the remaining five thirtieths. Thus, plaintiff should recover $1,667 less $167 or $1,500. See Heitz v. Sayers, 32 Del. 207, 121 Atl. 225 (1923).

[96] These damages should be foreseeable within the scope of note 86 *supra*.

[97] See discussion of "repairable" and "not repairable" in Acceptance of the Benefit, pp. __ *supra*.

[98] Assume our $3,000 building was half done when Contractor walked off the job. The value of the work and materials would be $1,500; the cost of completion would be $1,500. After limiting recovery to the $2,000 contract price, the cost of finishing the building should be deducted from value only to the extent that it reflects itself in the expectation interest. Since the last $1,000 of the cost of completion does dissipate the non-defaulter's expectancy, that is to be deducted from the $1,500—leaving plaintiff with a $500 recovery.

plied with and the value of the structure as defectively completed.[99] This difference must be subtracted from the value of the work and materials expended as a part of "damages" in order to measure the defendant's "net" benefit.

We are suggesting, then, a combination of the ideas found in both *Kirkland* and *Gillis*. This combination can be expressed in a variety of ways.[100] But the approach most in keeping with the theory of this remedy is to conclude that *value* establishes a prima facie case through a showing of the reasonable worth of the work and materials expended and that from this value is to be subtracted *damages* consisting of compensation for two elements: (a) the contract expectancy, if any, and (b) those items of recovery which must be allowed in order that the expectation interest be protected.[101] In no event should the defaulting contractor's expected profits be protected for this would place him in the same position had he been the one not in default. It is only the non-defaulting party's expectation interest that should be protected.[102]

Conclusion

The law—like equity—abhors forfeitures. Yet in those cases in which the plaintiff is in substantial default of an entire contract, courts have long used language which permits a forfeiture of the benefits conferred; beyond this, a considerable number of courts have so believed this language that they have actually forfeited that benefit.

This language and these results come from an uncritical appraisal of the problem involved. When courts find that there has been "no acceptance of the benefit" or when they conclude that the default was "willful," a surface sense of justice is satisfied in denying recovery to the defaulting contractor; to these courts the *innocent* have been protected and the *guilty* have received their proper punishment. Analysis must go deeper. Our action is one for *quantum meruit*—for the benefit that has been conferred. In such a case all that "justice" requires is that the innocent person be protected against all financial loss caused by the broken promise. Justice does not require the pound of flesh to be exacted as tribute to the party whose loss is measured only in fractions of an ounce.

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[99] Pinches v. Swedish Evangelical Lutheran Church, *supra* note 60.

[100] *E.g.*, the contract price could limit value rather than affect damages.

[101] The formula is stated this way rather than contract price less damages because this latter method changes completely the burden of proof and because it would allow a recovery of a portion of the defaulter's profits whenever Owner had entered into a bad bargain—that is, one where contract price exceeds market value.

[102] The formula, "value to defendant," may in some cases include a portion of contractor's profits since value carries with it a notion of what someone would pay for it. What someone would pay includes notions of what like structures (completed) have sold for, which includes a contractor's profit in building them. Thus the method of stating the formula as in note 101 *supra* is to be preferred.

Despite the fears expressed by many courts in justifying the application of the doctrine of no recovery to the defaulting contractor, decisions which fully protect the contract expectancy of the non-defaulter, and which allow him all damages suffered, will not have the effect of encouraging defaults by contractors who have made bad bargains. Their measure of recovery will reflect completely the entire badness of the bargains made. It is believed, therefore, that ideas of willfulness and of lack of acceptance have no place in the adjudication of a *quantum meruit* action brought by the defaulting building contractor to recover compensation for the benefit that he has conferred. "For this by nature is equitable, that no one be made richer through another's loss."